A

GUNALAN RAMACHANDRAN & ORS

v.

PP

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FEDERAL COURT, KUALA LUMPUR
RICHARD MALANJUM FCJ
ARIFIN ZAKARIA FCJ
ABDUL KADIR SULAIMAN FCJ
[CRIMINAL APPEAL NO: 05-19, 20, 21-2004(W)]

C

27 JANUARY 2006

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Appeal against conviction and sentence - Whether charge against accused premised on common intention or a joint*

D

charge - Whether trial judge failed to critically scrutinize evidence in reaching his decision - Whether defence succeeded in raising a reasonable doubt on prosecution's case

CRIMINAL PROCEDURE: *Appeal - Conviction and sentence, against - Accused convicted of trafficking in dangerous drugs and sentenced to death - Whether charge against accused premised on common intention or a joint charge - Whether trial judge failed to critically scrutinize evidence in reaching his decision - Whether defence succeeded in raising a reasonable doubt on prosecution's case*

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The three appellants/accused, who were charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') with trafficking in dangerous drugs, to wit 61.1 grams of monoacetylmorphines, were found guilty and sentenced to death by the High Court. On appeal, the Court of Appeal by a majority affirmed the conviction and sentence. In the present appeal, the two main grounds requiring consideration were: (i) whether the trial judge had failed to consider the issue that the charge against the accused was a joint charge; and (ii) whether the trial judge had failed to properly and adequately evaluate the defence's evidence to see whether it had in the circumstances raised a reasonable doubt on the prosecution's case as to entitle the accused to an acquittal. In the present case, the crucial evidence proving possession of the drugs against the first and third accused was the fact that they were found sitting down cross-legged on the floor, shirtless, with the drugs and other appurtenances in front of them when the police burst into the room. On those facts, the trial judge found the first and third accused to be in

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possession of the drugs. The first and third accused emphatically stated that they were nowhere near the drugs in question when the police entered the room, an assertion which was confirmed by the second accused. The second accused was found to be in possession of the drugs pursuant to s. 34 of the Penal Code ('the Code') on the basis of common intention, based solely on the allegation that he attempted to prevent the police from entering the room by pushing against the door. The trial judge dismissed the evidence of the accused as mere denials failing to cast any reasonable doubt on the prosecution's case.

Held (allowing the appeals and setting aside the appellants' conviction and sentence)
Per Arifin Zakaria FCJ:

(1) Having scrutinized the charge, it was clear that the charge was premised on common intention rather than a joint charge except that the words "in furtherance of common intention of you all" were missing from the charge. However, this defect in the charge was not fatal as the charge clearly stated that it had to be read together with s. 34 of the Code, a provision relating to a criminal act committed by several persons in furtherance of a common intention. It is a rule of evidence to infer joint responsibility for a criminal act performed by a plurality of persons. Judging from the conduct of their defence, the accused had not in any manner been misled or prejudiced by the charge. It would appear that they had fully appreciated the charge and the prosecution's case against them. The defect in the charge did not cause any prejudice or injustice whatsoever to the accused which was not curable under s. 422 of the Criminal Procedure Code. (para 7)

(2) On the facts, there was a serious discrepancy in the testimonies of two of the police officers as to what they saw the first accused doing when they entered the room, which had to be considered against the evidence of the accused that when the police entered the room, the first and third accused were both in a standing position. In the circumstances, the defence had succeeded in raising a reasonable doubt on the prosecution's case that the first and third accused were sitting cross-legged facing the drugs when the police entered the room. The question was where the drugs were in fact recovered by the police, bearing in

mind the defence's evidence that some were recovered in the room and some in the lounge, which led to the question of whether the accused had, in fact, exclusive custody and control over the drugs. The prosecution did not adduce any evidence as to who were the actual occupiers of the house. (paras 16, 17 & 18)

(2a) The other important fact that was put in the defence was the claim by the accused that their presence in the house on that night was wholly for an innocent purpose *ie*, that the first accused was moving his things from Kampung Pandan to this new premises. This was confirmed by one Ganesan, who was also arrested that night but never charged in court and whose evidence went unchallenged by the prosecution. (para 19)

(2b) Quite apart from the above consideration, there was one other important factor that was not considered by the trial judge, which was the arrest of 10 other male Indians in the house on the same night. None of them was called in to give evidence for the prosecution even though their evidence could have established who were the actual occupiers of the house and how long the accused had been in the rooms prior to the police raid. (para 20)

(2c) Considering the defence's case as against the prosecution's case, with all the infirmities discussed earlier, the defence had succeeded in raising a reasonable doubt on the prosecution's case and, hence, the accused should not have been convicted. (para 22)

[Accused acquitted and discharged.]

Bahasa Malaysia *translation of headnotes*

Ketiga-tiga perayu/tertuduh, yang menghadapi tuduhan mengedar dadah berbahaya di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'), iaitu 61.1 grams of monoacetylmorphines, telah didapati bersalah oleh Mahkamah Tinggi dan dihukum mati. Di rayuan, Mahkamah Rayuan, dengan keputusan majoriti, mengesahkan sabitan dan hukuman. Dalam rayuan semasa, dua alasan utama rayuan yang memerlukan pertimbangan adalah: (i) sama ada hakim bicara gagal mempertimbang isu bahawa tuduhan terhadap tertuduh adalah tuduhan bersama; (ii) sama ada hakim bicara gagal menilai dengan teratur dan secukupnya keterangan-

keterangan pembelaan bagi mempastikan sama ada keterangan-keterangan tersebut, dalam halkeadaan yang wujud, telah membangkitkan keraguan munasabah ke atas kes pendakwaan sekaligus mewajarkan pembebasan tertuduh. Dalam kes semasa, keterangan genting yang membuktikan milikan dadah terhadap tertuduh pertama dan ketiga adalah fakta bahawa, apabila polis menyerbu bilik, mereka didapati sedang duduk bersila di atas lantai, tanpa memakai baju, dengan dadah dan peralatan-peralatan bersangkutan lain berada di hadapan mereka. Atas fakta-fakta ini, hakim bicara mendapati tertuduh pertama dan ketiga mempunyai milikan dadah. Tertuduh pertama dan ketiga bertegas bahawa mereka tidak berada dekat dadah berkenaan apabila polis menyerbu masuk, penegasan mana telah disahkan oleh tertuduh kedua. Tertuduh kedua didapati mempunyai milikan dadah tersebut di bawah s. 34 Kanun Keseksaan ('Kanun') atas dasar niat bersama, semata-mata dengan berlandaskan aligasi bahawa beliau cuba menghalang polis dari memasuki bilik dengan menghadang pintunya. Hakim bicara menolak keterangan tertuduh sebagai suatu penyangkalan kosong yang gagal membangkitkan sebarang keraguan munasabah terhadap kes pendakwaan.

Diputuskan (membenarkan rayuan dan mengenepikan sabitan dan hukuman terhadap perayu-perayu)
Oleh Arifin Zakaria HMP:

(1) Setelah meneliti pertuduhan, adalah jelas bahawa pertuduhan adalah didasarkan kepada niat bersama dan bukannya pertuduhan bersama. Cumanya, perkataan-perkataan "in furtherance of common intention of you all" tidak dimasukkan ke dalam pertuduhan. Bagaimanapun, kelemahan pada pertuduhan ini tidaklah fatal, oleh kerana pertuduhan dengan jelas menyatakan bahawa ia hendaklah dibaca bersama-sama dengan s. 34 Kanun, iaitu peruntukan mengenai perbuatan jenayah yang dilakukan oleh beberapa pelaku ekoran dari suatu niat bersama. Adalah menjadi kaedah keterangan bahawa andaian tanggungjawab bersama akan dibuat apabila sesuatu perbuatan jenayah itu dilakukan oleh beberapa orang. Melihat kepada cara pembelaan diri mereka, tertuduh sama sekali tidak dikelirukan atau diprejudis oleh pertuduhan. Mereka nampaknya memahami pertuduhan dan kes pendakwaan terhadap mereka sepenuhnya. Kecacatan pada pertuduhan sama sekali tidak menyebabkan sebarang prejudis atau ketidakadilan yang tidak boleh dimaafi di bawah s. 422 Kanun Acara Jenayah kepada tertuduh.

(2) Berdasarkan fakta, terdapat percanggahan serius pada testimoni dua pegawai polis mengenai apa yang mereka lihat tertuduh pertama buat ketika mereka memasuki bilik, yang perlu dipertimbang bersesama dengan keterangan tertuduh bahawa tertuduh pertama dan ketiga berada dalam keadaan berdiri ketika polis memasuki bilik. Dalam halkeadaan sedemikian, pembelaan telah berjaya membangkitkan keraguan munasabah terhadap kes pendakwaan bahawa tertuduh pertama dan ketiga sedang duduk bersila menghadapi dadah apabila polis memasuki bilik. Persoalannya adalah, di manakah sebenarnya dadah dijumpai oleh polis, mengambil kira keterangan pembelaan bahawa sebahagiannya dijumpai di dalam bilik manakala sebahagian pula di ruang tamu, sekaligus membangkitkan persoalan sama ada tertuduh mempunyai jagaan dan kawalan ekslusif ke atas dadah. Pendakwaan tidak mengemukakan sebarang keterangan tentang siapakah sebenarnya penghuni rumah tersebut.

(2a) Satu fakta penting lain yang dibangkitkan oleh pembelaan adalah dakwaan tertuduh bahawa kehadiran mereka di rumah tersebut pada malam itu adalah semata-mata untuk tujuan baik, iaitu bahawa tertuduh pertama sedang memindahkan barang-barang beliau dari Kampung Pandan ke premis barunya. Ini disahkan oleh seorang Ganesan, yang turut ditangkap di malam tersebut tetapi tidak dituduh di mahkamah, yang mana keterangannya itu langsung tidak dicabar oleh pendakwaan.

(2b) Selain dari itu, terdapat satu lagi faktor penting yang tidak dipertimbang oleh hakim bicara, iaitu penahanan 10 orang lagi lelaki India di rumah tersebut pada malam yang sama. Tidak seorang pun dari mereka dipanggil untuk memberi keterangan bagi pihak pendakwaan, walaupun keterangan mereka mungkin boleh menjelaskan siapakah sebenarnya yang menghuni rumah tersebut dan berapa lama tertuduh berada di dalam bilik sebelum ianya diserbu polis.

(2c) Memperbanding kes pembelaan dengan kes pendakwaan, dan mengambilkira semua kelemahan-kelemahan di atas, pembelaan telah berjaya membangkitkan keraguan munasabah terhadap kes pendakwaan dan tertuduh, dengan itu, tidak sepatutnya disabitkan.

[Tertuduh dilepas dan dibebaskan.]

Case(s) referred to:
Chota Abdul Razak v. PP [1991] 3 MLJ 77 ***(refd)***
Moh Yee Chong & Anor v. PP [1955] MLJ 115 ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
PP v. Muhamad Nasir Shaharuddin [1994] 2 MLJ 576 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 170, 422
Dangerous Drugs Act 1952, s. 39B(1)(a), 39B(2)
Penal Code, s. 34

Other source(s) referred to:
Sarkar on Evidence, 15th edn, p 112

For the 1st & 2nd appellants - Gurbachan Singh; M/s Bachan & Kartar
For the 3rd appellant - Suresh Thanabalasingam; M/s Kuldip & Co
For the respondent - Abdul Wahab Mohamad DPP

[Appeal from Court of Appeal; Criminal Trial No: W-05-26, 27, 28-2002]

Reported by Suresh Nathan

JUDGMENT

Arifin Zakaria FCJ:

[1] The three appellants were charged in the High Court, Criminal Division, Kuala Lumpur, for an offence of trafficking in dangerous drugs, to wit 61.1 grams monoacetylmorphines, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act") and punishable under s. 39B(2) of the Act. They were found guilty by the High Court and sentenced to mandatory sentence of death. On appeal, the Court of Appeal by a majority affirmed the conviction and sentence and hence this appeal. For convenience, in this judgment I will refer to the appellants as the 1st, 2nd and 3rd accused, in the order they were referred to in the trial court.

[2] First, the narration of the prosecution case. On 3 February 1999 at around 10.25pm a police team headed by Chief Inspector Rajendran (SP4) raided an unnumbered squatter house at Kg. Sam Yoke, Jalan Sungei Besi, Kuala Lumpur. Accompanying him were eight other police officers. On reaching the house, they found the door was opened, and upon entering the house they found 10 male Indians in the "lounge". They were all watching

A television. SP4 introduced himself as "police" and directed his men to arrest the 10 male Indians. In the meantime he noticed a male Indian (subsequently identified as the 2nd accused) opening the door to the room next to the hall. In this judgment I shall refer to it as "the room". SP4 then tried to push open the door but
B was resisted by the 2nd accused. He then kicked open the door and rushed into the room followed by two of his men, Lance Corporal Duraiyappa (SP6) and Detective Lance Corporal Ahmad Kamil. In the room, SP4 found two more male Indians, the 1st and 3rd accused, who were sitting cross-legged on the floor,
C shirtless. The following items were found in the room:

(i) One big transparent plastic packet containing yellow powder and 'ketulan' suspected to be heroin;

(ii) Two transparent plastic packets which have been sealed,
D each packet containing two bundles of small plastic packets, each bundle containing 20 small plastic packets totaling 80 and each small plastic packet contained yellow powder and 'ketulan' suspected to be heroin;

(iii) One transparent plastic bowl containing yellow powder and
E 'ketulan' suspected to be heroin;

(iv) One metal container of Tong Kee Brothers Confectionery' containing 56 sealed, small plastic packets each of which contained yellow powder and 'ketulan' suspected to be heroin;

F (v) a transparent plastic packet containing one bundle of small plastic packets which were empty;

(vi) one pink plastic packet containing empty transparent plastic packets;

G (vii) a weighing machine with a brand name of 'Tanita';

(viii) one heat-sealer with a brand name of 'impulse' which was lighted;

(ix) a bunch of six keys;

H (x) a pair of scissors black in colour.

Out of these, according to SP4, the following were found in front of the 1st and 3rd accused:

(a) mangkok plastik lutsinar yang mengandungi serbuk dan
I ketulan berwarna kuning yang disyaki dadah heroin;

(b) peket lutsinar yang berisi satu ikatan peket-peket plastik kecil yang kosong;

(c) peket plastik berwarna merah jambu berisi peket-peket plastik lutsinar yang kosong.

(d) alat penimbang digital jenama 'Tanita';

(e) 'heat-sealer' jenama 'Impulse'; dan

(f) gunting berwarna hitam..

[3] The yellow powder and "ketulan" (lumps) found in the plastic packets and in the plastic bowl were confirmed by the chemist to be monoacetylmorpines, one of the dangerous drugs listed in Part III, of the first schedule of the Act, weighing 61.1grams. The three accused were accordingly charged with the offence of trafficking in the said drugs.

[4] The petition of appeals contained a number of grounds, some of which are overlapping. In these appeals I only need to consider the two main grounds canvassed before us, these are:

(a) Failure of the trial judge to consider the issue that the charge against the three accused was a joint charge; and

(b) Failure of the trial judge to critically scrutinize the evidence before him in coming to his decision.

Joint Charge

[5] On this issue it was put in argument that the charge as it stands is a joint charge because it uses the term "Bahawa kamu bersama-sama …" meaning "That you jointly ...". That being the case it was contended for the accused that the prosecution will have to prove joint possession as well as joint trafficking. (See s. 170 of Criminal Procedure Code.) Learned counsel for the 1st and 3rd accused in his argument said that this matter was raised before the Court of Appeal but the court dismissed the contention merely by saying that it was not correct to say that the trial judge did not consider the issue. This contention is also adopted by the learned counsel for 2nd accused. Having read the judgment of the learned judge I agree with the learned counsel for the accused that the learned judge did not at all consider the consequence of the joint charge. He only dealt with the issue of common intention.

[6] As stated by Visu Sinnadurai J in *PP v. Muhamad Nasir bin Shaharuddin* [1994] 2 MLJ 576 at p 588:

A One of the consequences of a joint charge is that the evidence adduced by the prosecution may not be sufficient to establish the guilt of each and every one of the accused. In cases of common intention, the prosecution need only establish that one of the accused committed the act and that the others participated in it in
B furtherance of a common intention. In cases of joint charges, however, the prosecution must adduce sufficient evidence to establish the guilt of each of the accused as a separate exercise.

[7] In the present case learned counsel for the accused contended that the prosecution failed to adduce sufficient
C evidence to support a joint charge, therefore, on that score alone the accused ought to have been acquitted without their defence being called. I have read and reread the charge, and I must admit that at a glance there is some ambiguity whether it is a joint charge or it is a charge premised on common intention. However,
D having scrutinized the charge I am of the view that it was clear that the charge was premised on common intention rather than a joint charge except that the words "in furtherance of common intention of you all" was missing from the charge. However, I am of the view that this defect in the charge is not fatal as the
E charge clearly states that it has to be read together with s. 34 of the Penal Code, a provision relating to criminal act committed by several persons in furtherance of a common intention. It is a rule of evidence to infer joint responsibility for a criminal act performed by a plurality of persons: *Chota bin Abdul Razak v. Public Prosecutor*
F [1991] 3 MLJ 77. Judging from the conduct of their defence I do not think that the accused had in any manner been misled or prejudiced by the charge. It would appear that they have fully appreciated the charge and the prosecution case against them. Therefore, as was held in *Moh Yee Chong (f) & Anor v. Public*
G *Prosecutor* [1955] MLJ 115 though the charges there were to some extent defective but by reason of s. 422 of the Criminal Procedure Code the defect although an irregularity could not possibly be said to have occasioned a failure of justice and therefore it was not fatal to the subsequent proceedings. Similarly
H here I think the defect in the charge did not cause any prejudice or injustice whatsoever to the accused which is not curable under s. 422 of Criminal Procedure Code. That sufficiently disposed of the first issue raised in the appeals herein.

I

Evaluation Of Evidence

[8] I shall next consider the second and more formidable point raised in these appeals. It was contended for the accused that the learned trial judge failed to properly and adequately evaluate the defence evidence to see whether it had in the circumstances raised a reasonable doubt on the prosecution case as to entitle the accused to an acquittal. The Court of Appeal by a majority of two to one dismissed the accused's contention and upheld the finding of the learned trial judge. Having scrutinized both the judgments of the majority and the minority I am inclined to agree with the view of the minority for the reasons that will follow.

[9] In answer to the charge all the three accused denied knowledge of the drug and claimed that their presence in the room at the material time had nothing to do with the drug. According to the first accused some one and half years prior to the arrest he operated a family restaurant in Klang, Selangor. When the restaurant business was closed down he rented a store in Kampong Pandan to keep the restaurant furniture and other things used in the restaurant business. He decided to move the restaurant furniture and other things to the squatter house at Kampong Sam Yoke, Jalan Sungei Besi, Kuala Lumpur. The reason was because the rental at Kampong Pandan was high. He did not live in this house but he had the permission of those living there to put those things there. Those living in the said house were identified as Balan, Naga and Suresh. They were also arrested together with the accused. To move the furniture and other things he engaged the services of one Ganesan a/l Suppaiyah (SD4), who owned a small lorry. Ganesan had to make two trips. The first arriving at the Jalan Sungei Besi at around 7pm and the second one arriving at around 9pm. Apart from Ganesan he was also assisted by the second and third accused plus two or three others. They finished carrying the furniture and other things into the house at around 10pm. After that he went into the room, where he was arrested, to change his shirt, and followed by the third accused who had wanted to give him the invitation card for his brother's wedding. A short while later the second accused entered the room. A few seconds after that he said he heard loud noises and a dog barking, and as they were about to see what was happening outside, police entered the room and arrested them. He denied that the police had to push the door in order to gain access to the room.

[10] He also stated that at the time he was arrested he was not sitting down cross-legged facing the drug as alleged by the police. When the police entered the room, he said, he was opening the wedding invitation card. The police straight away arrested the three of them and asked them to stay in the room. The police then searched the room and found some packets in the room and asked them to whom the packets belong, they told the police they did not know. They were then punched and kicked by the police. After that they were taken to the lounge. After searching the whole house police also found a black pouch bag on the sofa and a paper package near a television set in the lounge. When the police opened the pouch they found yellowish powder in small packets. In the paper package the police found a plastic packet containing yellowish powder.

[11] The evidence of the first accused was in large measure supported by the second and third accused. The second accused told the court that he went to the house on the request of the first accused to assist him in carrying the restaurant things from the lorry into the house. He went into the room to look for the first accused to get some money to buy food. In the room he saw the first and third accused talking to one another. About two to three seconds after he entered the room he heard loud noises from outside, and the word " police", and at the same time he also heard a dog barking. He then opened the door to see what was happening, and as he did so, three policemen entered the room and immediately arrested the three of them.

[12] The evidence of the third accused supports the evidence of the first and second accused. He told the court that he went to the house on the night in question to see the first accused to hand over the invitation card for his brother's wedding. On arrival at the house at Kampong Sam Yoke he saw a number of people unloading things from the lorry, the first accused asked him to give a hand and he did so. After unloading, the things were placed in the kitchen. After that he saw the first accused entering the room and he followed from behind. While the first accused was reading the card the second accused entered the room. At the same time he heard loud noises from outside and the sound of dog barking. The second accused then looked out to see what was happening and suddenly he realized policemen were standing in front of them. They were then handcuffed and told to sit while the police searched the room. The police found a square tin containing small plastic packets containing yellowish powder. He said the police

also found an electric sealer. When questioned by the police they denied that any of the things found in the room belong to them. They were then hit by the police. After that they were taken out of the room and joined the others, in the lounge, who were also arrested that night. He also confirmed that the police found a black pouch near the long sofa and the pouch contained small plastic packets containing yellowish powder. He also claimed that the police found a paper package near the television set, and the package was found to contain a plastic bag containing yellowish powder and lumps of yellowish substance. Again the police asked them to whom these items belong and all of them denied that they belong to any one of them. All of them together with the items found in the house were then taken to the police station.

[13] In our criminal law at the close of the defence case what the court needs to decide is whether the defence had succeeded to raise any reasonable doubt on the prosecution case. If the answer is in the positive then the accused person is without more entitled to his acquittal. It has to be remembered always that at no time, except in special circumstances, the burden of proof is cast on the defence: the burden rest all throughout on the prosecution to prove its case beyond any reasonable doubt. (See *Mohamad Radhi bin Yaakob v. Public Prosecutor* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311). The issue here is whether the accused had in the circumstances raised a reasonable doubt on the prosecution case. The learned trial judge answered the question in the negative. The Court of Appeal by a majority agreed with him.

[14] In the present case the crucial evidence against the first and third accused to prove possession of the drug is the fact that the two of them were found sitting down cross-legged on the floor, shirtless, with the drug and other appurtenances in front of them when the police burst into the room. On those facts the trial judge found the first and third accused to be in possession of the drug. The second accused was found to be in possession of the drug pursuant to s. 34 of the Penal Code on the basis of common intention. This is based solely on the allegation that he attempted to prevent the police from entering the room by pushing against the door. The evidence of the three accused were dismissed by the trial judge as mere denial and failed to cast any reasonable doubt on the prosecution case.

[15] In this case the first and third accused in their defence emphatically stated that when the police entered the room they were standing up and the first accused was reading the invitation card given to him by the third accused. In other words they were nowhere near the drug in question as stated by SP4 and SP6. This was confirmed by the second accused. To determine the reasonableness of the defence story one need to consider the circumstances prevailing at the time the raid on the house was conducted. According SP4, the raid was carried out by a team consisting of nine officers at around 10.25pm. It is an admitted fact that one of the member of the police party was bitten by a dog outside the house. As SP4 and his team approached the house he saw the front door of the house wide opened and they straight away rushed into the house. He noticed a number of male Indians sitting in the lounge. He then identified himself as police officer and directed his men to arrest them. In the circumstances I tend to agree with the defence submission that there is bound to be a lot of noises and because of that the second accused said he looked out to see what was happening. It is against that backdrop that the defence story ought to have been evaluated to see whether it cast any reasonable doubt on the prosecution case. In the circumstances I must say that I wholly agree with what was said by Abdul Aziz JCA in his dissenting judgment which reads:

> It was submitted by counsel for the first appellant after the close of the prosecution case, whose submission was adopted by counsel for the other appellants, that in those circumstances the first and third appellants would have been aware of the presence of the police and it was incredible that if they had been sitting cross-legged facing the drugs before the police arrived they would have continued to remain in that position when the police burst into the combing room. It was a point that merited serious consideration because even though the first and third appellants would have had only four or five seconds within which to react to the knowledge of the presence of the police, the normal reaction one would expect of a person in that situation would be instinctively instantaneous. He would instantly at least jump up and get away from the incriminating drugs. Yet the judge disposed of the point on the basis that the Chief Inspector and the other witness, the sixth prosecution witness, Detective Lance Corporal Duraiyappa, appeared to be truthful witnesses and what they said they saw must have been so. If a fact is in itself incredible it does not become any the less incredible simply because the person who relates it appears to be truthful. To accept it as true beyond

> reasonable doubt, to be able to entertain no doubt as to its truth, one has to have a reason for accepting it as credible in the circumstances. The judge does not say that in his judgment it was not incredible in the circumstances and give his reasons for saying so. He merely relied on the apparent truthfulness of the witnesses.

[16] The second issue raised in this appeal is the manner in which the learned trial judge dealt with the discrepancies in the testimonies of SP4 and SP6, as to what they saw the first accused was doing when they entered the room. What need to be considered is whether the discrepancies relate to material aspects of the case or otherwise. As stated in *Sarkar on Evidence* 15th edn. p. 112:

> Minor discrepancies are possible even in the version of truthful witnesses and such minor discrepancies only add to the truthfulness of their evidence (*Sidhan v. State of Kerala* [1986] Cri LJ 470, 473 (Ker)). But discrepancies in the statements of witnesses on material points should not be lightly passed over, as they seriously affect the value of their testimony (*Brij Lal v. Kunwar*, 36 A 187: 18 CWN 649: A 1914 PC 38). The main thing to be seen is whether the inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of the incongruities obtaining in the evidence. In the latter, however no such benefit may be available to it (*Krishna Pillai Sree Kumar v. State of Kerala* A [1981] SC 1237, 1239: 1981 Cri LJ 734).

[17] SP4 in his evidence in chief said he saw the first accused throwing the heat-sealer on to the floor. Contrary to this, SP6 who followed SP4 closely from behind when entering the room stated in chief that he saw the first accused was in the course of putting powder into a small packet. The learned trial judge dismissed this as minor discrepancy which he said is expected of any witness and this goes to strengthen the point that they were not fabricating evidence, they were telling the truth. To him what is important was whether the things containing the drug were in their possession at the material time. However, he went on to say that between the two he would prefer the evidence of SP4, being the first police officer to have entered the room. In this regard I am in agreement with Abdul Aziz JCA that the discrepancy here is far from being trivial as it pertains to an activity which the prosecution relied on in order to prove knowledge of the drugs in order to establish possession. This discrepancy has to be considered against the evidence of the accused that when SP4

and SP6 entered the room the 1st and 3rd accused were in a standing position. This gives rise to serious doubt on the accuracy of the evidence of SP4 and SP6, that when they entered the room the first and third accused were sitting down cross-legged facing the drug. If their attention was in fact focused on what the two accused were doing at the material time, as they claimed, then they could not be seeing two different activities. And it is all the more telling when no empty plastic packet was ever produced in evidence.

[18] In the circumstances, I agree with the submissions of counsel for the accused that the defence had succeeded to raise a reasonable doubt in the prosecution case that when SP4 and SP6 entered the room the first and third accused were sitting cross-legged on the floor facing the drug. The question is where the drug was in fact recovered by the police, bearing in mind the defence evidence that some were recovered in the room and some in the lounge. This leads to the question whether the accused in fact had exclusive custody and control over the drug. In considering this we to have to take into account the fact that no evidence was adduced by the prosecution as to who were the actual occupiers of the house. The accused in their defence maintained that Balan, Naga and Suresh were the occupiers of the house. They further said that the house is frequented by others who went there to pass their time watching television or gambling. They all had free access to the room.

[19] The other important fact that was put in defence was that on the night in question the first accused was moving his restaurant things from the store in Kampong Pandan to this new premise. If this is true, it would support the claim by the accused that their presence in the house that night was wholly for an innocent purpose. This is confirmed by SD4, Ganesan a/l Suppaiyah, who was also arrested that night but was never charged in court. It is also in evidence that the lorry used in moving the things was still at the house when the police raided the house. SD4 told the court that when he was arrested he was waiting for payment from the 1st accused. The evidence of SD4 was not challenge by the prosecution.

[20] Quite apart from the above consideration there is one other important factor which was not considered by the learned trial judge that is, the arrest of ten other male Indians in the house on the same night. None of those arrested was called to give

evidence for the prosecution. Their evidence could establish as to who were the actual occupiers of the house. They may also be able to establish how long the three accused had been in the room prior to the police raid. This I think is crucial to the prosecution case as no observation was made by the police prior to the raid. Unfortunately none of them was called by the prosecution.

[21] It is against this background that the defence case ought to be tested, to see whether it has succeeded to cast any reasonable doubt on the prosecution case. The burden on the defence throughout is a light one as stated by Mohaamed Azmi SCJ in *Mohamad Radhi bin Yaakob v. Public Prosecutor (supra)* at p.171:

> To earn an acquittal, the court may not be convinced of the truth of the defence story or version. Raising a reasonable doubt in the guilt of the accused will suffice. It is not, however, wrong for the court to be convinced that the defence version is true, in which case the court must order an acquittal. In appropriate cases it is also not wrong for the court to conclude that the defence story is false or not convincing, but in that instance, the court must not convict until it asks a further question, that even if the court does not accept or believe the defence explanation, does it nevertheless raise a reasonable doubt as to his guilt? It is for this reason that in dealing with the defence story or explanation, the majority of judges rightly prefer to adopt straightaway the legally established 'reasonable doubt' test, rather than to delve in the 'believable and convincing' test before applying the reasonable doubt test.

Conclusion

[22] Considering the defence case as against the prosecution case, with all the infirmities discussed earlier, I am of the firm view that the defence had succeeded in raising a reasonable doubt on the prosecution case and hence the three accused ought not in the circumstances to have been convicted. In the result I would allow the appeals herein and set aside the conviction and sentence imposed on the three accused. The accused are accordingly acquitted and discharged of the charge.

[23] My learned brothers Richard Malanjum and Haji Abdul Kadir bin Sulaiman FCJJ have read this judgment in draft and have expressed their agreement with it.